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No. 14

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

BRIEF FOR THE APPELLANT

MARVIN S. SLOMAN,
HUBERT D. JOHNSON,
Of Carrington, Johnson & Stephens,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Attorneys for Appellant.

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No. 90

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

On Appeal From the Supreme Court of Texas

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas (R. 365-374) is reported at 341 S. W. 2d 161.* The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (R. 351-363) is reported at 331 S. W. 2d 349 (Tex. Civ. App., 1960), there being no official reports for Texas Courts of Civil Appeals.

*Not yet officially reported.

JURISDICTION

On November 23, 1960 the Texas Supreme Court entered the judgment appealed from (R. 364-365); and on December 21, 1960 it overruled appellant's motion for rehearing (R. 374-375). On March 16, 1961 appellant filed its notice of appeal to this Court (R. 375-376). On October 9, 1961 this Court entered its order in this case and in No. 91, Republic National Bank of Dallas v. C. H. Langdeau, Receiver, consolidating the two cases and postponing the question of jurisdiction to the hearing on the merits (R. 381). The jurisdiction of this Court rests on 28 U.S.C. §1257(2). Appellant's authorities and argument in support of this Court's jurisdiction appear under Part I of the Argument, pp. 11-26 below.

STATUTES INVOLVED

FEDERAL STATUTES

1. 12 U. S. C. §94 (1940 ed) (REV. STAT. §5198; 18 STAT. 320; 36 STAT. 1167):

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

2. PERTINENT STATUTES AT LARGE

(i) 12 STAT. 681 (1863)*:

> "[S]uits, actions, and proceedings by and against any association under this act may be

*Act of February 25, 1863, §59. The 1863 act, the first legislation regarding national banks, was repealed and superseded by The National Bank Act, Act of June 3, 1864, *infra*.

had in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

(ii) THE NATIONAL BANK ACT, §57, 13 STAT. 116 (1864):

"[S]uits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however,* That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

(iii) REV. STAT. §5198 (1875), 18 STAT. 320:

"[S]uits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

STATE STATUTES

Article 21.28 of the INSURANCE CODE of Texas, as amended (Acts 1955, 54th Leg., pp. 737, 742, ch. 267), [captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers"], Section 4(f):

"Sec. 4. Actions.

"• • •

"(f) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceed-

ings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

QUESTIONS PRESENTED

This civil action was brought in a state court in Travis County, Texas by the statutory liquidator-receiver of an insurance company against appellant, a national banking association located in Dallas County, Texas. Appellant asserted that under the provision of The National Bank Act contained in 12 U. S. C. §94 it was entitled to be sued in Dallas County, Texas. The Texas Supreme Court held that the federal statute was not intended to control venue in a civil action against a national banking association in the state court. The questions presented are:

1. Whether the judgment of the Texas Supreme Court in this case is such a final judgment as may be reviewed by this Court under 28 U. S. C. §1257 (2).

2. Whether the provision of The National Bank Act contained in 12 U. S. C. §94 governs venue of an action against a national banking association in a state court.

3. Whether, as suggested by the Texas Supreme Court, the provision contained in 12 U. S. C. §94 is "permissive" only rather than mandatory.

4. Whether the Texas statute relating to venue of actions by the statutory liquidator-receiver of insurance companies [Article 21.28 §4(f) of the Insurance Code of Texas], rather than the provision of 12 U. S. C. §94, governs actions

in state courts in Texas against national banking associations

STATEMENT

The Insurance Company of Texas (which name was later changed to ICT Insurance Company) was organized in May of 1950 under the insurance laws of Texas (R. 25). On February 20, 1957 the State of Texas commenced in the 98th District Court of Travis County, Texas a delinquency proceeding against ICT Insurance Company (herein called "ICT") (R. 346). In due time the 98th District Court of Travis County, Texas appointed a permanent receiver of ICT (R. 346). Shortly prior to July 21, 1958 the Board of Insurance Commissioners of the State of Texas duly designated C. H. Langdeau, appellee herein, as Liquidator. Under Article 21.28 of the Texas Insurance Code the Liquidator is the person designated by the Texas Board of Insurance Commissioners to be receiver, liquidator, rehabilitator, or conservator of insurers. On July 21, 1958 the 98th District Court of Travis County, Texas duly appointed appellee as receiver of ICT; and he promptly qualified as such receiver (R. 346-347).

After Appellee was appointed and qualified as receiver of ICT as such receiver he filed this plenary action in the 98th District Court of Travis County, Texas (R. 1). Appellee's pleading in this action names appellant and 143 other parties as defendants (R. 2-12). Such pleading is quite long (R. 1-321) and difficult to summarize briefly. Broadly stated, appellee charges that appellant and the other defendants entered

into a conspiracy to defraud ICT and the public, which conspiracy "began in May 1950 and continued until February 20, 1957, the date of receivership" (R. 20-23). Based on the alleged "consiparcy to defraud" appellee claims that the appellant and the other defendants are liable "jointly and severally, in the sum of $15,000,000.00 with legal interest from May 24, 1950" (R. 316-317). Based on certain alleged wrongful acts by appellant at various times from June 6, 1950 through April 4, 1952 appellee seeks separate recovery from appellant of various sums totalling in excess of $600,000.00 plus interest from the dates of the alleged wrongs (R. 318). Appellee also seeks separate recovery for alleged wrongful acts of other defendants and groups of defendants occurring at various times (R. 317-321).

Pursuant to Rule 86 of the Texas Rules of Civil Procedure appellant duly filed its pleading designated as a plea of privilege (R. 322-324), claiming that by the express provisions of the federal law applicable to national banking associations the action against it could be had only in a court in Dallas County, Texas (R. 323-324). Republic National Bank of Dallas, appellant in No. 91, duly filed a similar plea of privilege (R. 325-326). Appellee then duly filed his sworn pleading controverting the two pleas of privilege (R. 337-343). Both pleas of privilege were heard by the trial court pursuant to Rule 87 of the Texas Rules of Civil Procedure, and both were overruled (R. 343-344; 344-345).

From the order of the trial court overruling its plea of privilege appellant duly appealed to the Court of Civil Ap-

peals for the Third Supreme Judicial District of Texas at Austin. Republic National Bank of Dallas similarly appealed. In connection with such appeals appellant, appellee, and Republic National Bank of Dallas duly executed and filed an agreement as to certain material facts (R. 345-348), including (1) the material facts as to the ICT receivership and appellee's qualification as receiver; and (2) that as of February 20, 1957 and all times thereafter each of the banks was a national banking association with "each having its principal and only place of business in the City of Dallas, Dallas County, Texas." In such agreement it was further stipulated that "the only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants to have said Plaintiff's action against them transferred to the state court in Dallas County, Texas or whether state statutes on venue of such action was controlling" (R. 347-348).

On December 9, 1959 the Court of Civil Appeals delivered its single opinion in both appealed cases (R. 351-363), and it entered judgments reversing the trial court and remanding each of the cases with instructions to render judgment sustaining each of the pleas of privilege and to transfer the cause as to the appellants involved "to any Civil District Court of Dallas County in accordance with the provisions of Rule 89" of the Texas Rules of Civil Procedure (R. 349-350). This opinion of the Court of Civil Appeals was grounded primarily on the conclusion that the federal stat-

ute (12 U. S. C. §94) was plain (R. 362) and that the decisions of the United States Supreme Court "fix venue of actions against national banks in State courts only in the county in which the bank is located, in accordance with the plain wording of Section 94" (R. 358).

Appellee duly applied to the Texas Supreme Court to grant writ of error to review the judgments of said Court of Civil Appeals, which application was granted. In the Texas Supreme Court the two cases were consolidated and heard together. On November 23, 1960 the Texas Supreme Court delivered its opinion in both cases reversing the judgments of the Court of Civil Appeals and affirming the judgments of the trial court (R. 365-374). On the same date the Texas Supreme Court entered judgments in accordance with such opinion (R. 363-365). The Texas Supreme Court, agreeing that the cases presented "but a single question of law" (R. 365), reversed primarily on the ground that "It was not the intention of the Congress in adopting 12 U. S. C., Section 94 * * * that it was to control with respect to an action against a national bank commenced in a state court" and that "This is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes" (R. 369). The Texas Supreme Court rejected the statements of this Court in *First National Bank of Charlotte v. Morgan*, 132 U. S. 141 (1889), as dicta and therefore not binding on the Texas Supreme Court (R. 371-372).

SUMMARY OF ARGUMENT

QUESTION ONE—JURISDICTION OF THE COURT

The only issue on the record concerns whether the Texas judgment appealed from is to be deemed a final judgment under 28 U. S. C. § 1257.

Texas law provides for a separate hearing, trial, and decision on any venue issue before trial on the merits. No revision of that decision is permissible by the trial court after the term. Texas law permits appeal, and requires prompt appeal to avoid waiver of a venue challenge. As a matter of Texas law, the judgment (of whatever court) ultimately resolving a venue issue is conclusive and final. Texas procedure and Texas law thus clothe the judgment appealed from with an actual finality for all future Texas purposes.

"Final judgments or decrees" as used in 28 U. S. C. § 1257 and "final decisions" as used in 28 U. S. C. §§ 1291 and 1293 mean the same thing. This Court's practical construction in *Cohen v. Beneficial Industrial Loan Corp.* of what is final for purposes of review can and should be applied in this case.

Measured by the standards of finality in the *Cohen* case, this Court has jurisdiction because:

(1) The judgment appealed from was a formal judgment which concludes and closes the venue issue conclusively and finally in Texas.

(2) The venue issue which was concluded and disposed of below in the separate venue hearing and ap-

peal was separable from and collateral to the merits of the case. No step of any kind was thereby taken toward final disposition of the merits. The judgment below will not be merged in any final judgment on the merits.

(3) If review by this Court is delayed until after trial in Travis County, Texas, it will be too late effectively to remedy the denial of appellant's right to trial in Dallas County, Texas. By that time appellant's claimed federal right will have been lost.

(4) There has been a complete denial of an important federal right granted by Congress to national banks. This appeal does not involve merely an erroneous application of a right recognized by the courts below.

Texas has fully adjudicated rights, and such adjudication is not subject to further review there. A state statute has been sustained, and the conflicting federal statute rejected. The case can never be more mature for review than it is now.

QUESTIONS TWO, THREE, AND FOUR—CONSTRUCTION OF THE FEDERAL STATUTE INVOLVED.

Allowance or denial of a national bank's privilege of venue is a matter of federal law, and not state law.

National banks are Congressionally-created, and may not be interfered with by state legislative or judicial action except so far as Congress may permit.

This Court has plainly decided that the venue right asserted herein must be recognized by state courts. *First National Bank v. Morgan.*

Subsequent decisions of this court have recognized the continuing efficacy of the *Morgan* decision. None authorizes the decision of the Texas Supreme Court below.

State court decisions are flatly conflicting. Those holding the federal statute "permissive" only render the statute meaningless.

The federal decisions, holding application of the statute obligatory, necessarily imply a corollary that any contrary state statute, rule, or policy must fall.

There is no indication that Congress intended 12 U. S. C. §94 not to apply to state court actions. The evidence is to the contrary.

The legislative history of, and decisions under, related statutes concerning suits against national banks show that such statutes have in no way impeded the full force of 12 U. S. C. §94.

ARGUMENT

I

THIS COURT'S JURISDICTION IN THE PRESENT CASE

A. The Issue as to Jurisdiction

This Court's October 9, 1961 order stated that further consideration of the question of jurisdiction was postponed to the hearing of the case on the merits (R. 381). Accordingly, at the outset appellant will address itself to the question of whether or not this Court has jurisdiction to consider this appeal.

28 U. S. C. §1257 (2), which provides for this Court's jurisdiction over appeals from judgments of state courts, reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "* * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In this case from the outset there was drawn in question the clash between the federal statute governing national banks and a state statute. The Texas Supreme Court, the highest court in Texas in civil cases, held that the state statute rather than the federal statute controls.

In the trial court appellant claimed that under 12 U. S. C. §94 appellant had the right to insist on being sued in a court in Dallas County, Texas (R. 323-324). In opposition to this claim appellee contended that a state statute on venue [Section 4(f) of Article 21.28 of the Texas Insurance Code] controlled rather than the federal statute. The basic facts pertinent to this legal issue were undisputed. The trial court held the state statute to be valid and controlling. On the appeal by appellant to the Court of Civil Appeals, the intermediate court of appeals in Texas, the parties stipulated and agreed that "the only issue involved" was whether the federal statute or the state statute controlled with respect to the right claimed by appellant and denied by the trial court (R.

347-348). The Court of Civil Appeals held that the federal statute controlled and that appellant did have the federal right that it asserts. The Texas Supreme Court held that appellant did not have the right that it had claimed under the federal statute, saying the matter is one "where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes" (R. 369). The Texas Supreme Court thus decided the conflict in favor of the state statute, and it overruled without opinion appellant's motion for rehearing.

The record in this case plainly shows that the only question concerning this Court's jurisdiction is one involving the interpretation of the phrase "final judgments or decrees" as that phrase is used in the opening words of 28 U. S. C. §1257.

B. The Judgment of the Texas Supreme Court in This Case is Such a Final Judgment as May Be Reviewed by This Court.

Since this case concerns a Texas judgment overruling a plea of privilege, we deem it material to refer briefly to the Texas procedure upon such pleas and the Texas law as to the incidents and effects of the judgment thereon. Texas procedure in civil actions provides for the conclusive disposition of venue issues before the trial on the merits. Rule 86 of the Texas Rules of Civil Procedure* requires that a challenge to venue be by a verified plea of privilege. Such verified plea of privilege was duly filed by appellant in the present case.

*Set forth in full, Appendix A.

If the party bringing the action desires to oppose such plea of privilege, he must file a verified controverting plea. In the present case appellee filed such a controverting plea (R. 337-343). Rule 87 of the Texas Rules of Civil Procedure* provides for a separate hearing and trial, by jury if demanded, on the venue issue joined by the filing of the controverting plea. In the present case the trial court, without the intervention of a jury, held such a separate hearing and trial (R. 343-345). It was stipulated that appellee was the duly appointed and qualified receiver of ICT appointed by the trial court in which the action was being brought and that appellant was a national banking association with its principal and only place of business in Dallas County, Texas. Accordingly, as to venue the sole question was the legal question of whether the federal statute relied on by appellant or the state statute relied on by appellee was controlling. In Texas there is no procedure for carrying venue issues forward for hearing and determination with the trial on the merits. The trial court held that appellant did not have the right that it claimed to have under the federal statute.

Texas procedure provides for appellate review of trial court judgments sustaining or overruling pleas of privilege. Article 2008, Revised Civil Statutes of Texas. Not only is such separate appeal available in Texas, under the Texas decisions the complaining party must appeal promptly or he will waive his right to complain. By Texas decisions the ruling on a plea of privilege is treated as final insofar as it disposes of the issue as to the venue of the case. In *Wichita*

*Set forth in full, Appendix A.

Falls & S. R. Co. v. McDonald, 141 Tex. 555, 174 S. W. 2d 951, 952-953 (1943), the Texas Supreme Court held:

> "However, it appears to be well settled under the rules and decisions of this State that a ruling on a plea of privilege is treated as final in so far as it disposes of the issue as to the venue of the case. In this connection it will be noted that the rules provide for a separate hearing on the issues raised by the plea of privilege and controverting affidavit. Rule 87. They further provide that an appeal from the order or judgment of the court thereon may be prosecuted by either party. The appeal must be perfected within twenty days after the rendition of the order appealed from. In the event the plea of privilege is sustained and the case ordered transferred to another county, such appeal suspends the enforcement of the order. Rule 385. A failure to appeal from the order entered on the plea of privilege at the term of court at which such order was made and entered is a waiver of any right to thereafter complain of the same. Smith Bros. Grain Co. v. Windsor & Stanley, Tex. Com. App., 255 S. W. 158. Such an order from which no appeal has been prosecuted has a sufficient element of finality to support a plea of res judicata. Old v. Clark, Tex. Civ. App., 271 S. W. 183; Hewitt v. DeLeon, Tex. Civ. App., 5 S. W. 2d 236; Scott v. Clark, Tex. Civ. App., 38 S. W. 2d 382, par. 6; Roach v. Trinity Universal Ins. Co., Tex. Civ. App., 119 S. W. 2d 127; See also First National Bank v. Hannay, 123 Tex. 203, 67 S. W. 2d 215. It has also been held that an order overruling a plea of privilege entered at one term is not subject to review by motion to reconsider filed at a subsequent term. United Brothers of Friendship of Texas v. Wilson, Tex. Civ. App., 53 S. W. 2d 95; Pass v. Ray, Tex. Civ. App., 44 S. W. 2d 470."

In any further Texas proceedings the determination by the Texas Supreme Court on the venue issue will be considered binding also on general principles of the law of the case.

Norwood v. Cobb, 20 Tex. 588 (1857); *Connecticut General Life Ins. Co. v. Bryson*, 148 Tex. 86, 219 S. W. 2d 799 (1949); *Commonwealth Nat. Bank v. Goldstein*, 261 S. W. 538 (Tex. Civ. App. 1924, error dism'd).

The following are thus fundamentals under Texas law: (1) the hearing on the plea of privilege is a separate trial to be held prior to any trial on the merits; (2) a party who is dissatisfied with a judgment on a plea of privilege must appeal promptly to avoid waiving its right to thereafter complain of the judgment; (3) the judgment or ruling on a plea of privilege is treated as final insofar as it disposes of the issue as to the venue of the case, the sole issue involved in the venue trial; and (4) in the case at bar there can be no later state court judgment that passes on or disposes of the federal right claimed by appellant in this case. It is in this context that the interpretation of the phrase "final judgments or decrees" in 28 U. S. C. §1257 is presented in this case.

The words "final judgments or decrees", as used in 28 U. S. C. §1257, are found with slight differences in verbiage in various present and past statutes relating to federal appellate jurisdiction. 28 U. S. C. §1291 and 28 U. S. C. §1293 relating to appeals to federal courts of appeal from federal district courts and from courts of Puerto Rico, use the words "final decisions." In Section 25 of the first Judiciary Act of 1789 (1 Stat. 85), the forerunner of 28 U. S. C. §1257, Congress used the phrase "a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had." In Section 21 of the First Judiciary Act of 1789 (1 Stat. 83) Congress used

the phrase "final decrees in a district court in causes of admirably and maritime jurisdiction." In Section 22 of the same act, the forerunner of 28 U. S. C. §1291, Congress used the phrase "final decrees and judgments in civil actions in a district court." There does not appear to be any historical basis for these slight variations in wording. See Warren, *History of the Federal Judiciary Act of 1789*, 37 HARVARD LAW REVIEW 49, 104-105 (1924); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE LAW JOURNAL 537, 549 (1932).

Many decisions under the various federal appellate jurisdiction statutes have discussed the reasons or purposes of requiring finality of lower court judgments or decrees as a condition to appellate review. The primary reasons frequently stated are to disallow appeals from decisions which are tentative, informal or incomplete and to avoid piecemeal and fragmentary review. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949); *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120 (1945). Viewed from the standpoint of reason or purpose as well as from the standpoint of legislative history, the phrases used in present sections 1257, 1291, and 1293 are identical in meaning. In *Matter of Tiffany*, 252 U. S. 32, 36 (1920), the two phrases as used in earlier statutes relating to jurisdiction were said to "mean the same thing." See, also, *Buscaglia v. District Court of San Juan*, 145 F. 2d 274, 280-1 (1st Cir. 1944), *cert. den.* 323 U. S. 793 (1945).

Given such final determination, review of cases originating in federal courts and of cases originating in state courts

differs only as to types of subject matter which may be involved. Under 28 U. S. C. §1291 and 28 U. S. C. §1293 ultimate federal review, in courts of appeals at least, is assured as to all issues in the cases. On the other hand, under 28 U. S. C. 1257 federal judicial review is available only in those limited cases where the issue involves interpretation of a treaty or statute of the United States or conflicts between state statutes and the federal constitution, treaties or laws. It is apparent that 28 U. S. C. §1257 already contains quite narrow restrictions upon review based on the nature of the issue. The decisions interepreting sections 1257, 1291 and 1293 suggest no basis for any narrower or different standard for determining reviewability of state court and federal court cases insofar as the element of finality is concerned.

A leading case in this Court involving the meaning of "final" is *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). In that case the plaintiffs had brought a stockholders' derivative action in the United States District Court against the Delaware corporate defendant and certain of its managers and directors, trial court jurisdiction being based on diversity of citizenship. On the basis of a New Jersey statute adopted while the action was pending the corporate defendant moved to require the plaintiffs to furnish security for expenses. The trial court denied the motion on the ground that the state enactment was not applicable to such an action pending in a federal court. The Court of Appeals was of a contrary opinion and reversed. This Court granted certiorari and affirmed. All of the justices of this Court were in agreement as to the reviewability of the deci-

sion under 28 U. S. C. §1291, though there were differences among the members of the Court as to the merits. Because of the pointed applicability to the present case of the portion of the opinion in the *Cohen* case dealing with jurisdiction to review the trial court's decision (337 U. S. at 545-547), we set forth that part of the opinion in full in Appendix B.

In the *Cohen* case the trial court's decision was described as one that falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S. at 546. Examination of the elements, negative and affirmative, governing review as discussed in the *Cohen* case shows that the judgment appealed from here is a final judgment which may be reviewed by this Court.

(1) Terminative Effect.

In the *Cohen* case this Court said (337 U. S. at 546):

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken."

From the record in the present case it is obvious that the judgment of the trial court was formal and not tentative, informal or incomplete. Under Texas law and practice it was conclusive and final as to the venue right. By the Texas stat-

ute creating the 98th District Court of Travis County, Texas that state court has a term of court lasting two months. Art. 199, Revised Civil Statutes of Texas. After the end of the term of court in which the order overruling the plea privilege was entered the trial court had no power to reconsider or change its order on the plea of privilege. If appellant desired to keep from waiving the right granted to it by federal statute, it had to appeal; and the ultimate decision on that appeal is determinative and final on the venue right. In the *Cohen* case there was the possibility of a later appeal at a time when it would have been "too late effectively" to review the trial court's decision. In this case, under Texas practice delay in appeal by the complaining party would have resulted in waiver of the right to complain.

Conceding that the state law on finality is not controlling insofar as the ultimate question before this Court is concerned, nevertheless the state law as to the nature and effect of the judgment in its local context is significant to the jurisdictional question before this court, in that it clothes the decision presented for review with actual finality. The decision below, as far as Texas is concerned, is actually complete, actually closed, actually finished, actually conclusive. This finality-in-fact does bear heavily on the tests of reviewability under *Cohen v. Beneficial Industrial Loan Corp.*—including the particular factor under consideration as well as others discussed later herein.

In *Montgomery B. & C. T. C. v. Ledbetter Erec. Co.*, 344 U. S. 178 (1952), relied on by appellee in his motion to dismiss the appeal, the Alabama trial court's temporary writ of injunction was provisional and temporary because the trial

court had continuing jurisdiction to dissolve or modify the temporary injunction at any time and was required to reconsider the same matters again on the permanent injunction hearing which was yet to be held in the trial court. Here the trial court in Texas did not have and does not have any such continuing jurisdiction and or authority to reconsider or set aside its final judgment as to venue. Equally inapplicable here and for the same reasons are the other authorities relied on by appellee, *Market Street Railway Co. v. Railroad Commission*, 324 U. S. 548 (1945), and *Arnold v. United States*, 263 U. S. 427 (1923).

In the present case the state court has "fully adjudicated rights" and such "adjudication is not subject to further review by a state court." This is the test of finality as announced by this Court in *Gospel Army v. City of Los Angeles*, 331 U. S. 543 (1947). The judgment in the present case fully satisfies the requirement that it be one that concluded and closed the matter. Unless this Court reviews now the judgment of the Texas Supreme Court in the present case, the right provided for in 12 U. S. C. §94 will be lost as effectively as if such right had never existed.

(2) Separability and Collateral Nature of the Claimed Right.

In the *Cohen* case this Court stated another requirement for reviewability as follows (337 U. S. 546):

> "Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the

> proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment."

In the case at bar the judgment appealed from fully meets this standard. In the separate trial on the plea of privilege the trial court considered only the matter of whether or not appellant was entitled to be sued in a court in Dallas County, Texas. There was no disputed fact relating to the venue issue. It was stipulated that appellee was the receiver referred to in the state statute and that appellant was a national bank with its principal and only place of business in Dallas County, Texas. The trial court's determination did not make any step toward final disposition of the merits of the case. In its opinion in the present case the Texas Supreme Court clearly stated (R. 367):

> "In this connection, in determining the venue question here involved, we are not passing upon the merits, and nothing said herein shall be so construed."

Upon final disposition of appellee's action on its merits the judgment would not even make reference to the final judgment made long before at the conclusion of the venue hearing relating to the proper venue of the suit.

Of the 144 defendants named in the appellee's action in the present case only appellant and Republic National Bank of Dallas are national banks entitled to claim rights under 12 U. S. C. §94. This court has long recognized the reviewability of adjudications which are final in nature, concern matters distinct from the general subject of the litigation,

and affect only the parties to the particular controversy as to which review is sought. Such adjudications may be reviewed without awaiting the determination of the general litigation or the rights of other parties who are before the lower court but who are completely disinterested in the matter presented for review. *United States v. River Rouge Imp. Co.*, 269 U. S. 411 (1926); *Brady v. Work*, 263 U. S. 435 (1924); *Williams v. Morgan*, 111 U. S. 684 (1884).

(3) Time for Effective Review.

In the *Cohen* case this Court emphasized the benefits of review at a time when review could be effective in the following statement (337 U. S. at 546):

> "When that time [final judgment on the merits] comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

These observations grounded on practicality and fairness are particularly appropriate in the present case. The federal right asserted by appellant is the right to require that appellee's action against it be tried in Dallas County, Texas, rather than in Travis County, Texas. It would be highly unjust, as well as wasteful and unnecessary, to require that appellant stand trial with 143 other defendants in a distant court contrary to the federal statutory provision, if applicable, thereby losing the benefit of its claimed federal right in order to arrive ultimately at a point where it can get from the Texas courts to this Court for a determination of

whether or not such "lost right" had existed. The issue cannot conceivably be more mature or ripe at a later stage, and deferral of review will work irreparable injury to appellant with no compensating benefit to the orderly and efficient administration of justice. As stated by the Court in a related context in *Cobbledick v. United States*, 309 U. S. 323, 328-329 (1940), interepreting the earlier case of *Perlman v. United States*, 247 U. S. 7 (1918):

> "To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes."

Appellee's pleading does not suggest that his state court action will involve any further federal question as to appellant, and we know of none ourselves. That this case may never again be presented to this Court for review on that account, or that appellant might (as appellee has suggested) not complain at a later stage if appellant prevails in or after a Travis County trial, does not negative the fundamental fact that by that time appellant would have lost its valuable federal right. Unless this Court reviews and corrects the decision below at this stage, such right will be forever lost.

If appellee's contention in this respect is sustained, then the ruling of the court below on appellant's venue right under 12 U. S. C. §94 in the state court action will in fact be "in-

sulated from federal judicial review," just as the Texas Supreme Court said.

In the *Cohen* case this Court pointed out that it had long given the jurisdictional statute a "practical rather than a technical construction." The present case clearly calls for such a practical construction of the statute. *Swift & Co. v. Compania Colombiana*, 339 U. S. 684, 689 (1950).

(4) Denial of an Important Federal Right.

In the *Cohen* case this Court concluded its remarks on reviewability of the lower court's judgment as follows (337 U. S. at 546-547):

> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."

In the present case as in the *Cohen* case there has been a categorical denial of a federal right. In the *Cohen* case the right was conferred by a New Jersey statute, and there might have been some basis for doubt as to whether the right was available in the federal court in New Jersey. There the right was important because it provided a way to save the defendant from substantial expense. Here the right was

granted by clear federal statute which has been a part of the federal law since the enactment of The National Bank Act of 1864. The right is an important right in that it protects the national bank from expense, inconvenience, and the possibility of local prejudice or bias. In any event, it is an important federal right because Congress granted it, and if it is to be denied Congress alone should make this determination. On other occasions this Court has recognized the material distinction between reviewing the question of whether an important federal right had been denied and reviewing a question involving the application of a recognized right. *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8 (1931).

We emphasize that this Court's review now of the judgment entered below does not call for any general exception to or variance from previously recognized principles governing reviewability in this Court. The assumption of appellate jurisdiction here will not tend to enlarge or generally expand this Court's jurisdiction. The narrow facts here involved present a correspondingly narrow question as to this Court's jurisdiction to review the judgment from which appeal has been taken. In the *Cohen* case this Court described the decision there reviewed as being within "that small class." We sincerely urge that the present case comes within the same "small class" referred to in the *Cohen* case. The complete and unqualified denial of appellant's federal right in this case justifies and calls for present appellate review by this Court.

II

THE PROVISION OF THE FEDERAL STATUTE CONTAINED IN 12 U. S. C. §94 GOVERNS VENUE OF AN ACTION AGAINST A NATIONAL BANKING ASSOCIATION. THE PROVISION IN SUCH FEDERAL STATUTE IS MANDATORY. THE STATE STATUTE CAN NOT GOVERN THIS STATE COURT ACTION AS AGAINST NATIONAL BANKING ASSOCIATIONS.

In *Van Reed v. People's National Bank*, 198 U. S. 554, 557 (1905) this Court said:

> "The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interferred with by state legislative or judicial action, except so far as the law-making power of the government may permit."

In its opinion in the present case the Texas Supreme Court cited the *Van Reed* case and recognized its principle in the following language (R. 369):

> "If, under federal decisions, United States Revised Statute No. 5198, 12 U. S. C., Sec. 94, is applicable here, then all state statutes in conflict therewith must yield."

Again, the Texas Supreme Court stated (R. 373):

> "Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its con-

stitutional or statutory rights, nor can a federal right be defeated under the name of state practice."

We submit that while these principles were recognized, they were not applied, in the decision of the Texas Supreme Court. For it has given effect to state legislative and judicial action which interferes with the right granted to national banks by the federal statute contained in 12 U. S. C. §94.

A. Federal Statutory Background.

Preliminary to a discussion of the statute and authorities applying it, a brief resume of the history of the legislation will be helpful. The first federal statute which provided for the formation of national banking associations was the Act of February 25, 1863, 12 Stat. 665-682 (1863). Section 59 of that 1863 act provided "that suits, actions, and proceedings by and against any association under this act may be had in any circuit, district or territorial court of the United States within the district in which such association may be established." 12 Stat. 681 (1863).

The 1863 act was very shortly superseded by the Act of June 3, 1864, 13 Stat. 99-118 (1864), known as The National Bank Act, 18 Stat. 123 (1874), 12 U. S. C. §38 (1940 ed.). Section 57 of the 1864 act provided "that suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said associ-

ation is located having jurisdiction in similar cases." 13 Stat. 116-117 (1864). Where the 1863 act had referred to suits by *and* against national banking associations, the 1864 act referred only to actions against national banking association. Where the 1863 act had provided only for actions in federal courts in the district in which the banking association may be established, the 1864 act provided for actions in the federal court in the district in which the national banking association may be established or in a state, county or municipal court in the county or city in which the national banking association is located.

In the Revised Statutes of 1873, the revisers omitted Section 57 of the Act of June 3, 1864. It is doubtful that this omission had the effect of repealing Section 57 of The National Bank Act. This Court's opinion in *First National Bank v. Fellows Ex Rel. Union Trust Co.*, 244 U. S. 416, 428 (1916), indicates that Section 57 of The National Bank Act had been the law continuously since 1864. In any event, Congress soon reenacted the provision in the Revised Statutes of 1875, as follows (Act of February 18, 1875, 18 Stat. 316, 320):

> "Section five thousand one hundred and ninety-eight is amended by adding thereto the following: 'That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases'."

No change of any kind in the pertinent statute has been made from February 18, 1875 to the present. In Section 291 of The Judicial Code of 1911, Congress transferred all the powers of the circuit courts to the district courts. 36 Stat. 1167. Based on this, in 12 U. S. C. §94 (1940 edition) the codifiers eliminated the reference to circuit courts.

B. Decisions in the Federal Courts.

The allowance or denial of a national bank's privilege of venue under the foregoing statutory provisions is a matter of federal law, and not state law. *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 52-3 (1941). Accordingly, we turn to an examination of the federal court decisions under those statutes. Such decisions uniformly fail of lending support to the decision of the Texas Supreme Court herein.

The decision of most pointed applicability to the case at bar on the effect to be given the federal statute in state courts is *First National Bank v. Morgan*, 132 U. S. 141 (1889). In it a national bank located at Charlotte in Mecklenburg County, North Carolina was sued in the Superior Court of Cleveland County, North Carolina. The bank defended upon the merits. When it was unsuccessful on the merits it appealed to the Supreme Court of North Carolina, and in that appellate court for the first time claimed the right granted to it under R. S. §5198. The state court affirmed. This Court affirmed because the defendant had waived its venue right in failing to assert its right promptly. But this Court's decision was plain and compelling in its holding that the federal venue

right must be recognized by state courts. The Court stated (132 U. S. at 145):

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. *First Nat. Bank of Bethel v. Pahquioque Nat. Bank*, 81 U. S. 14 Wall. 383, 394; *Crocker v. Marine Nat. Bank*, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

The Texas Supreme Court justified its disregard of the *Morgan* case with the explanation that "the statement was dicta, and is, therefore, not binding on this court" (R. 372). To the contrary, as a matter of stare decisis we stand on this Court's plain view of the statute expressed in the *Morgan* opinion. It forcefully reflects the absence in 12 U. S. C. §94, as stated by the Court of Civil Appeals below (R. 362), of any "tenable ground upon which to construe a plain statute contrary to its express wording." It is consistent with decisions which preceded it, and has been recognized as correct, expressly or impliedly, by the subsequent decisions on the subject.

Three federal decisions preceded the *Morgan* decision. The first of these was *Cadle v. Tracy*, 4 Fed. Cas. 967, No. 2279 (C. C. S. D. N. Y. 1873), construing §57 of The National Bank Act. In the *Cadle* case a resident of Kentucky had sued a national bank located in Alabama in the Supreme Court of New York. The receiver of the national bank sued in the federal circuit court to enjoin proceedings in the state court. At page 972 the court stated:

> "Moreover, congress having provided for the creation of these associations, and having power to say where they may be sued, when, taking the 8th and 57th sections of the act together, we find that congress has prescribed that they may be sued in certain designated courts, it is a proper construction of the language, to hold, that they must be sued in these courts, and cannot be sued in any others."

The application of §57 in the *Cadle* case, though in a somewhat different context from the *Morgan* case and the case at bar, clearly views the application of the statute as manda-

tory. There is no basis in reason for holding the statute mandatory as between conflicting jurisdictions of different states, and conflicting jurisdictions of different counties within a single state.

The *Morgan* decision was foreshadowed by this Court's opinion in *Bank of Bethel v. Pahquioque Bank*, 81 U. S. (14 Wall.) 383 (1872), where this Court was reviewing a decision of the Supreme Court of Errors of the State of Connecticut. The defendant bank had contended that the state court had no jurisdiction over the national bank. Rejecting this contention, the Court at the outset assumed the applicability of the federal provision as to state venue (81 U. S. at 402):

> "Commenced as the action was in the proper court of the state where the Association is located and in a court having jurisdiction in similar cases, which is not denied, it is quite clear that the objection to the jurisdiction of the court founded upon the chraracter of the association as an instrument of the National Government, must be overruled. Jurisdiction in such suits is, unquestionably, vested in any circuit, district or territorial court of the United States held within the district in which such association may be established, but the decisive answer to the objection of the defendants is that the same section of the Act of Congress gives authority to creditors to prosecute such controversies in 'any state, county or municipal court in which said association is located' in all cases where it appears that such courts have jurisdiction under the state laws in similar controversies. * * * Authorities to support the proposition are not necessary, as it rests upon an express provision in the Act of Congress. 13 Stat. at L. 116."

The next pre-*Morgan* case to come before this Court was *Casey v. Adams*, 102 U. S. (12 Otto) 66 (1880), decided under Rev. Stat. §5198, the successor to Section 57 of The National Bank Act. Adams & Co. sued in a state court in Lafourche Parish, Louisiana, to foreclose a mortgage, and after foreclosure the court ordered the national bank which claimed under a prior mortgage to show cause why its mortgage should not be eliminated in distribution of the fund in custody of the court. The national bank claimed that under Rev. Stat. §5198 it could be sued only in New Orleans, where it was located. The trial court denied the bank's claims, and the Supreme Court of Louisiana affirmed. On writ of error, this Court affirmed, holding that Rev. Stat. §5198 "relates to transitory actions only, and not to such actions as are by law local in their character." *Cf. Collett v. Adams*, 249 U. S. 545 (1919).

If this Court had thought that the statute does not apply to any actions against national banks commenced in state courts, it would not have made any distinction between transitory and local actions; but the Court expressly stated that the statute does relate to transitory actions in state courts. The *Casey v. Adams* decision is not referred to in the opinion of the Court in the later *Mor[illegible]* case.

In the case at bar, the Texas Supreme Court did not base its decision on the narrow exception made in *Casey v. Adams* for local actions. From appellee's pleading it is obvious that this plenary civil action for damages is a typical transitory action, in no way "local" in nature.

Federal decisions subsequent to the *Morgan* case indicate its continued authority. No Supreme Court decision has passed again on the question directly.

In *First National Bank v. Fellows Ex Rel. Union Trust Co.*, 244 U. S. 416 (1916), the Attorney General of Michigan had brought a quo warranto proceeding against a national bank in a state court. Similarly to the *Bethel* case, supra p. 33, one of the questions involved was whether the proceeding could be maintained in the state court. Similarly to the *Morgan* case, apparently, no assertion was made by the bank that venue was improper, and the bank defended on the merits alone. See 244 U. S. at 421. The majority opinion concluded that the quo warranto proceeding could be maintained in the state court. In this connection, incidental support was found generally in §57 of The National Bank Act, apart from any specific venue issue of which none was present in the case (244 U. S. at 428):

> "And our conclusion on this subject is fortified by the terms of §57, chap. 106, 13 Stat. at L. 116, making controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations, although, without the grant of the act of Congress, such controversies would have been Federal in character."

The dissenting justice in the case pointed out with regard to §57 (244 U. S. at 431):

> "The provision cited from the Act of 1864 has been in the statutes for fifty-three years, and no one seems ever to have thought until now that it was intended to authorize a proceeding such as this against a national bank. I think its words do not fairly lend themselves to

> that purpose. They have hitherto been regarded, and in practice treated, as referring to ordinary suits such as may be conveniently prosecuted against a bank in its home town and county. Besides, the terms of the provision show that it can have no application here. After providing for suing a national bank in the Federal or territorial court of the district in which it is established, the provisions adds, 'or in any state, county or municipal court in the county or city in which said association is located.' This bank, as the record discloses, is located in Bay City, Bay County. The proceeding was begun and had in the supreme court of the state at the capitol, which is Lansing, Ingham County. Therefore the provision can give no support to the proceeding."

The *Morgan* case and the other foregoing decisions all involved either §57 of The National Bank Act or its present successor, Rev. Stat. §5198. All involved the construction and application of the federal statute insofar as it related to actions against national banks in state courts. In each, with the exception of the *Cadle* case, the action had been brought in the same state where the national bank was located. If the federal circuit court in New York and this Court had considered that the federal statute did not apply to actions brought in state courts against national banks, all of the cases could have been disposed of readily on the ground that Congress had not intended for the federal statute to apply to actions against national banks commenced in state courts.

Other Supreme Court decisions involving the federal statute lend force to the present vigor of 28 U. S. C. §94 and the *Morgan* interpretation of its effect.

In *Bank of America v. Whitney Central Nat. Bank*, 261 U. S. 171 (1923), Bank of America, a New York corpora-

tion, brought action in the federal court for the Southern District of New York against Whitney Central National Bank, a national bank with its banking house and usual place of business at New Orleans, Louisiana. The defendant appeared specially, challenged the jurisdiction of the court, and moved that the service be set aside. This Court concluded that the defendant was not in New York and could not be served or sued there. This Court stated (261 U. S. at 173):

> "Whether a national bank could, under any circumstances, be subjected, without its consent, to suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

In a footnote relating to this passage the Court referred to Rev. Stat. §5198 and *First Nat. Bank v. Morgan*, 132 U. S. 141.

Cope v. Anderson, 331 U. S. 461 (1947), was one of several cases arising out of the insolvency and receivership of the National Bank of Kentucky. In discussing an unrelated question of limitation, this Court cited 12 U. S. C. §94 for the proposition that a national bank can be sued only in its own district.

Federal courts of appeals have construed R. S. §5198 (12 U. S. C. §94) on at least two occasions, in each case consistent with the obligatory effect of the statute for which we contend. *Leonardi v. Chase National Bank of the City of New York*, 81 F. 2d 19 (2d Cir., 1936); *Buffum v. Chase Nat. Bank of the City of New York*, 192 F. 2d 58 (7th Cir., 1951). In the latter case the court stated that "it seems clear

that the proper venue, in the absence of waiver or consent, is determined by Section 94 of 12 U. S. C. A." While these decisions involved actions in federal courts, they nevertheless involve the same statute. In view of the wording of the statute there is no warrant for interpreting it one way as to actions in federal courts and another as to action in state courts.

We respectfully submit that the Texas Supreme Court has failed to follow the controlling federal decisions construing the federal statute involved, and "under the name of state practice" it has deprived appellant of its statutory right.

C. State Decisions.

Before this Court decided the *Morgan* case in 1889 the state courts of New York and of Massachusetts had construed Section 57 of The National Bank Act. In *Cooke v. State Nat. Bank*, 50 Barb. 339 (1867), affirmed, 52 N. Y. 96 (1873), the New York court had held that the federal statute was "permissive" and not mandatory. In *Crocker v. Marine National Bank*, 101 Mass. 240 (1869) the Massachusetts court held (101 Mass. at 242):

> "This section manifests the intention of congress that each of these associations should be sued, either in the federal or in the state courts, only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least interruption and inconvenience of its business; and that the election of plaintiffs to sue in any court whatever should be confined within these limits in all cases."

In the *Cadle* case in 1873, supra, p. 32, the Massachusetts *Crocker* case was cited and followed. In its opinion in the *Morgan* case in 1889 this Court also cited it.

In 1929 the New York court recognized the holding of this Court in the *Morgan* case and repudiated the earlier New York cases holding that the right granted by the federal statute was permissive. *Raiola v. Los Angeles First Nat. Trust & S. Bank*, 133 Misc. 630, 233 N. Y. S. 301 (1929). The Texas Supreme Court in the present case relied heavily on the North Carolina decision in *Curlee v. National Bank*, 187 N. C. 119, 121 S. E. 194 (1924), which in turn relied primarily on New York cases decided prior to 1889, since repudiated in New York in 1929. The applicability of 12 U. S. C. §94 in state court actions is thoroughly examined, and the statute held persuasively to be mandatory in the leading state court case of *Monarch Wine Co. v. Butte*, 113 Cal. App. 2d 833, 249 P. 2d 291 (1952).

The principal state court decisions on this question are set forth in Appendix C hereto. It is apparent from a reading of these that the courts of the several states which have ruled upon the question involved herein are in irreconcilable conflict, in spite of the fact that the federal decisions, which should control state courts in construing federal statutes, have been in accord from 1873 to date. The most recent state court case which completely ignores these federal decisions is that of the Supreme Court of Nebraska in *Hills v. Burnett*, 172 Neb. 370, 109 N. W. 2d 739 (1961). As to such state court cases, we heartily endorse the statement below of the Court of Civil Appeals in this case, that "we have been struck by

the difficulty encountered by courts in applying or construing a statute (Section 94) which to us is plain and unambiguous" (R. 362).

D. State "Permissive" Interpretations Render the Statute Meaningless.

The state courts that have proceeded on the theory that the use of the word "may" in the statute renders it "permissive" and not mandatory have failed to recognize that this theory actually renders the statute meaningless. The word "may" appears only once in the statute. Section 5198 is permissive only in the sense that it contemplates that complainants against a national bank may (1) proceed in the federal court in the district in which the bank is established or may (2) proceed in a state court in the county in which the national bank is located. If Congress had merely meant that actions against national banks may be brought in the federal district court held within the district in which such association may be established or in any other federal district court, it would have said that such actions may be brought in any federal district court. Likewise, as to actions in state courts Congress would have said that the actions may be brought in any state court. In *Crocker v. Marine National Bank*, 101 Mass. 240 (1869), the plaintiff had contended that Section 57 of The National Bank Act was "merely permissive." In answer to this contention the Massachusetts court said (101 Mass. at 242):

> "But, according to their construction, so much of it as relates to courts of the United States would seem to have no effect, except in the case of a plaintiff residing in

> the district in which the association is established; and so much of it as relates to the state courts would seem to be wholly useless and superfluous."

This Court's opinion in the *Morgan* case cited and followed this Massachusetts case.

In *Monarch Wine Co. v. Butte*, 113 Cal. App. 2d 833, 249 P. 2d 291 (1952), the California court pointed out:

> "If it was intended that the national bank could be sued in any county of the state, it would have been sufficient for the section to state 'in any state, county or municipal court of the state in which the bank is located'."

The conclusion that the federal statute mandatorily controls and limits venue of actions in state courts against national banks involves as a necessary corollary the conclusion that a state statute does not and cannot control the venue of such actions. *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, 52-3 (1941). Otherwise, a state statute could modify or even nullify a federal statute controlling a federal instrumentality. In *Crocker v. Marine National Bank of New York*, 101 Mass. 240 (1869), the Massachusetts court observed this inevitable consequence of recognizing the applicability of the federally-created right (101 Mass. at 242):

> "The whole purpose of the eighth section appears to have been to clothe the association with the attributes of a corporation, including that of suing and being sued. Unaccompanied by further legislation, that would have left the jurisdiction over suits against it to be regulated, according to the subject matter involved or the parties interested, by the existing laws of the United States and the several states respecitvely. But the fifty-seventh section designates not only the judicial district of the courts

> of the United States, but the locality of the state courts, within which suits may be brought against such associations; and, by thus regulating the whole subject of suits against such corporations, so far supersedes all other rules, or, to speak more accurately, prevents them from ever applying to such suits."

The Texas Supreme Court's opinion in the present case is the first authority we have found that even suggests that the presence or absence of a state statute on venue has anything to do with the construction of the federal statute on venue of actions against national banks. If Congress had intended to permit the states to deal as they might see fit with this subject, it could have so provided.

E. The Unwarranted Holdings Below as to Congressional Intent.

The Texas Supreme Court stated its belief that "it was not the intention of the Congress in adopting 12 U. S. C. Section 94 * * * that it was to control with respect to an action against a national bank commenced in a state court" (R. 369). We have examined the history of the debates in Congress in vain for any indication of such negative intent. Indeed, we have found no discussion on the floor of Congress, or any other indication of the mind of the legislature extrinsic to the statute itself, as to its intended meaning. As we have shown, a parsing of the text of the statute itself requires the conclusion that Congress meant exactly what it said.

In its opinion in the present case the Texas Supreme Court also states that the "enactment of Section 4, Chapter 290, in 1882, and the rewriting of the Judiciary Act in 1948, did not

mean the repeal of the section of the Banking Act, now designated as Section 94 * * * but indicated the intention of the Congress to limit the Act so as to apply only to actions against a national bank commenced in a federal court" (R. 373-374). The Texas Supreme Court concludes erroneously that Section 1348 of the Judicial Code of 1948 (28 U. S. C. § 1348) merely reenacted the language of the 1882 act.

Section 1348 of the Judicial Code of 1948 (28 U. S. C. §1348), reads as follows:

> "The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."

In fact, this Section 1348 reenacted the language of Chapter 231, Section 24 of the Act of March 3, 1911 which enacted the Judicial code of 1911 [36 Stat. 1087, 1092, 28 U. S. C. §41 (16)]. The second sentence of former 28 U. S. C. §41 (16) and the second paragraph of 28 U. S. C. §1348 (1948) re-enacted almost verbatim the first grammatical paragraph of Section 4 of the Act of August 13, 1888 (25 Stat. 433, 436). In *Continental National Bank v. Buford*, 191 U. S. 119 (1903), this Court carefully considered the pertinent provision of the Act of July 12, 1882 (22 Stat. 162) and of the

Act of August 13, 1888, and emphatically concluded (191 U. S. at 123-124):

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by, and exercised their powers under, acts of Congress. No other purpose can be imputed to Congress than to effect that result." [Citing *Ex parte Jones*, 164 U. S. 691 (1896)].

See, also *Petri v. Commercial National Bank of Chicago*, 142 U. S. 644 (1892).

The Act of June 25, 1948 (62 Stat. 869), was described as an act to revise, codify and enact into law Title 28 of the United States Code entitled "Judicial Code and Juidiciary." 28 U. S. C. §1348 is part of Chapter 85 captioned "District Courts; Jurisdiction." At the end of this Act of June 25, 1948 there appeared Section 39 stating that "the section or parts thereof of the * * * Revised Statutes of the United States or Statutes at Large enumerated in the following schedule are hereby repealed" (62 Stat. 992). The schedule referred to (62 Stat. 992-1009), includes the 1882 act and the 1888 act but does not include any part of the act of June 3, 1864, or of Rev. Stat. §5198, or of Title 12 of the U. S. Code. In statutory construction there is a presumption against implied repeals, and the existence of a specified repealer provision indicates that further repeals, by implication, were not intended. 1 SUTHERLAND, STATUTORY CONSTRUCTION (3rd Edition) §§2014-2015, pp. 468-471.

In *International Refugee Organization v. Bank of America*, 86 F. Supp. 884 (S. D. N. Y. 1949), the court held:

> "No change was made in T. 12 U. S. C. A. §94 by the 1948 revision of Title 28, and said §94 is in full force and effect."

A recent report of the Senate Committee on Banking and Currency indicates its assumption that 12 U. S. C. §94 is still in full effect.*

It is apparent that the Texas Supreme Court in its conclusion as to an implied limitation of Rev. Stat. §5198, arrived at such construction without proper consideration of the legislative history of the subsequent statutes or of the major decisions of this Court concerning them.

F. Summary.

The rejection of 12 U. S. C. §94 by the Texas Supreme Court is not justified, either upon the language of the statute itself, or upon the decisions of this Court under the statute, or upon consideration of the legislative history of the statute and related legislation.

CONCLUSION

The trial court in Texas and the Texas Supreme Court have denied the existence of appellant's federal right and

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*S. REP. No. 121, 85th Cong., 1st Sess. (1957), Committee on Banking and Currency of the United States Senate. The committee was dealing with the Financial Institutions Act of 1957, S. B. 1451. As to §69 of the bill, which restated almost verbatim 12 U. S. C. §94, the Committee commented:

> "Section 69. Venue of actions.
>
> "'This section, dealing with the courts in which actions against national banks may be brought, is the same as title 12, United States Code, section 94, except obsolete reference to circuit courts deleted'."

The bill passed the Senate but was not passed by the House.

deprived appellant of the benefit of it. This Court has jurisdiction to review the final judgment entered by the Texas court depriving appellant of that right. Only by review now in this Court and reversal of the judgment of the Texas Supreme Court can appellant's right be effectively recognized and protected.

In its plea of privilege in the trial court appellant prayed that the trial court enter its order transferring the case as to appellant to a state civil district court in Dallas County, Texas. This prayer was in accordance with the federal right granted in Rev. Stat. §5198 (12 U. S. C. §94), and with Rule 89 of the Texas Rules of Civil Procedure relating to transfer of venue.

The judgment of the Texas Supreme Court should be reversed, and the cause remanded with a direction that the Texas Supreme Court order transfer of appellee's action against appellant to a state civil district court in Dallas County, Texas. 28 U. S. C. §2106.

Respectfully submitted,

Marvin S. Sloman

MARVIN S. SLOMAN,

Hubert D. Johnson

HUBERT D. JOHNSON,

Of Carrington, Johnson & Stephens,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Attorneys for Appellant.

PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 29, 1961, I served copies of the foregoing brief of appellant on the appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for appellee at the following post office addresses:

Cecil C. Rotsch, Esq.,
P. O. Box 13,
Austin, Texas.

Messrs. Keith, Mehaffy, McNicholas & Weber,
Kaufman Trust Building,
Beaumont, Texas.

Messrs. Cureton & Lanham,
401 Professional Building,
Waco, Texas.

Marvin S. Sloman

MARVIN S. SLOMAN,
1700 Mercantile Bank
Building,
Dallas 1, Texas,
Counsel for Appellant.

APPENDIX A

TEXAS RULES OF CIVIL PROCEDURE

RULE 86. PLEA OF PRIVILEGE

A plea of privilege to be sued in the county of one's residence shall be in writing and sworn to, and shall state that the party claiming such privilege was not, at the institution of such suit, nor at the time of the service of process therein, nor at the time of filing such plea, a resident of the county in which suit was instituted, and shall state the county of his residence, and the post office address of himself or his attorney and that "no exception to exclusive venue in the county of one's residence provided by law exists in said cause"; and such plea of privilege when filed shall be prima facie proof of the defendant's right to change of venue; provided that such plea shall not constitute a denial under oath of any allegations of plaintiff's petition required to be denied under oath by Rule 93 unless specifically alleged in such plea. A copy of such plea of privilege shall be served on the adverse party or his attorney of record by actual delivery in person to him or by mailing a copy of such pleading to him by registered mail return receipt requested. If such adverse party desires to controvert the plea of privilege, he shall within ten days after he or his attorney of record received the copy of the plea of privilege file a controverting plea under oath, setting out specifically the grounds relied upon to confer venue of such cause on the court where the cause is pending.

RULE 87. HEARING ON PLEA

Upon the filing of such controverting plea the judge or justice of the peace shall note on same a time for a hearing on the plea of privilege. Setting of the date for such hearing and the notation thereof may be made by such judge or justice of the peace anywhere he may be found, either within or without the county where the suit is pending. Such hearing, unless the parties agree upon the date, shall not be had until a copy of such controverting plea, including a copy of such notation thereon, shall have been mailed by registered mail to the de-

fendant or his attorney at the post office address stated in such plea of privilege, or shall have been delivered to defendant or his attorney, at least ten days before the date set for hearing, after which the court shall promptly hear such plea of privilege and enter judgment thereon. If the defendant demands a trial by jury on the venue question, the court, in its discretion, may require the cause to be tried on its merits at the same time.

APPENDIX B

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 545-7 (1949):

[Opinion as to appealability]

"At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 USC 1948 ed §1291 provides, as did its predecessors, for appeal only 'from all final decisions of the district courts,' except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.

"The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.

"Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present

order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia v. Sweeny*, 1 Pet. (US) 567, 569, 7 L ed 265, 266; *United States v. River Rouge Improv. Co.*, 269 US 411, 414, 70 L ed 339, 343, 46 S. Ct. 144; *Cobbledick v. United States*, 309 US 323, 328, 84 L ed 783, 786, 60 S. Ct. 540.

"We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."

APPENDIX C

ALABAMA

First Nat. Bank v. Alston, 231 Ala. 348, 165 So. 241 (1936)

CALIFORNIA

Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157 (1890)

Monarch Wine Co. v. Butte, 113 Cal. App. 2d 833 249 P. 2d 291 (1952)

FLORIDA

County of Okeechobee v. Florida Nat. Bank, 112 Fla. 309, 150 So. 124 (1933)

GEORGIA

Continental Nat. Bank v. Folsom, 78 Ga. 449, 3 S. E. 269 (1887)

IOWA

Merchants Nat. Bank v. Henderson, 218 Ia. 657, 254 N. W. 65 (1934)

LOUISIANA

Adams & Co. v. Daunis, 29 La. Ann. 315 (1877)

MASSACHUSSETTS

Crocker v. Marine National Bank, 101 Mass. 240 (1869)

MICHIGAN

Levitan v. Houghton Nat. Bank, 174 Mich. 566, 140 N. W. 1019 (1913)

MINNESOTA

DeCock v. O'Connell, 188 Minn. 228, 246 N. W. 885 (1933)

MONTANA

Stewart v. First Nat. Bank & Trust Co., 93 Mont. 390, 18 P. 2d 801 (1933)

NEBRASKA

Hills v. Burnett, 172 Neb. 370, 109 N. W. 2d 739 (1961)

NEW JERSEY

Cassatt v. First Nat. Bank, 9 N. J. Misc. 222, 153 A. 377 (1931)

NEW YORK

Cooke v. State Nat. Bank, 50 Barb. 339 (1867), affirmed 52 N. Y. 96 (1873)

Robinson v. Nat. Bank, 81 N. Y. 385 (1880)

Talmage v. Third Nat. Bank, 91 N. Y. 531 (1883)

Raiola v. Los Angeles First Nat. Trust & S. Bank, 133 Misc. 630, 233 N. Y. S. 301 (1929)

Crofoot v. Giannini, 196 Misc. 213, 92 N. Y. S. 2d 191 (1949)

Rabinowitz v. Kaiser-Frazer Corp., 198 Misc. 312, 96 N. Y. S. 2d 638 (1950)

Chaffee v. Glens Falls National Bank & Trust Co., 204 Misc. 181, 123 N. Y. S. 2d 635 (1953), aff'd., 128 N. Y. S. 2d 539 (1954)

NORTH CAROLINA

Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194 (1924)

NORTH DAKOTA

Burns v. Northwestern Nat. Bank, 65 N. D. 473, 260 N. W. 253 (1935)

OHIO

Lee v. Citizens' National Bank, 1 Am. L. Rec. 385, 5 Ohio Dec. Reprint 21 (1872)

SOUTH CAROLINA

Holmes & Durham v. National Bank, 18 S. C. 31 (1882)

TEXAS

Guerra v. Lemburg, 22 S. W. 2d 336 (Tex. Civ. App. 1929)

WASHINGTON

Zarbell v. Bank of America Nat. Trust & Sav. Ass'n, 52 Wash. 2d 549, 327 P. 2d 436 (1958)

WISCONSIN

Brust v. First Nat. Bank, 184 Wis. 15, 198 N. W. 749 (1924)